Editor's note: Reconsideration denied; decision reaffirmed -- See Herman Joseph (On Reconsideration), 22 IBLA 266 (Oct. 30, 1975); Appealed -- dismissed, (mooted by Dept. policy change), Civ. No. F76-201 (D.Alaska 1978)

HERMAN JOSEPH

IBLA 75-195 Decided July 30, 1975

Appeal from decision of Fairbanks District Office, Bureau of Land Management, rejecting Native allotment application F-14411.

Affirmed.

1. Alaska: Native Allotments -- Withdrawals and Reservations: Power Sites

   Where an applicant for a Native allotment asserts use and occupancy of the land in 1959 and the land is included in an application for power site withdrawal of the lands in 1963, and is withdrawn in 1965 for such purposes, the applicant has failed to demonstrate the five years use and occupancy prior to the effective date of the withdrawal as required by the Secretarial directive of October 18, 1973. This is based upon the finding that an application for power purposes, upon its filing, immediately withdraws the land pursuant to section 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1970).

APPEARANCES: E. John Athens, Jr., Esq., Alaska Legal Services Corporation, Fairbanks, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Herman Joseph has appealed to this Board from a decision of the Fairbanks District Office, Bureau of Land Management, dated September 13, 1974, rejecting his Native allotment application because he did not show five years occupancy and use prior to the withdrawal of the land.

The application was filed on October 26, 1971, asserting that occupancy on the land commenced on July 6, 1960. By letter of July 3, 1974, appellant asserted that he has "used my land every year since 1959 * * * for trapping, hunting, berry picking, and camping. I have a cabin, food cache, traps, snares, and fire pits on my land now." He also asserted that his cabin was built in 1947.

The Notice of May 8, 1974, which called upon appellant to furnish additional evidence of use and occupancy, recited in part as follows:

> All of the lands of the subject allotment were included in Application F-030632, filed by the Director, Geological Survey on January 9, 1963, to withdraw approximately 8,955,520 acres of public land in Alaska from all appropriations under the public land laws and to classify it for powersite purposes as the Rampart Canyon Power Project. Public Land Order 3520, designating this area as "Powersite Classification No. 445" (Yukon River near Rampart, Alaska), classification dated January 5, 1965, was published in the Federal Register January 9, 1965, classifying these lands subject to Section 24 of the Federal Water Power Act of June 10, 1920 (41 Stat. 1075; 16 U.S.C.), as amended. This Act provides that any of the lands of the United States included in an application for powersite development under said Act, shall from the date of filing of the application be reserved from entry, location, or other disposal under the laws of the United States, until otherwise directed by the Federal Power Commission or by Congress. (43 CFR 2344.0-3) (emphasis in original).

The Assistant Secretary for Land and Water Resources informed the Director, Bureau of Land Management, by memorandum of October 18, 1973, in part as follows:

> 2. Where a native has not completed the five-year period of occupancy of lands prior to the effective date of a withdrawal or reservation of the lands, the allotment application should be rejected.

[1] The decision appealed from recited:

> The Secretarial directive of October 18, 1973, that a Native Allotment applicant claiming land which has been withdrawn from appropriation must show substantial use and occupancy of the land for at least five years prior to the segregative date of the withdrawal has been upheld in Christian G. Anderson et al., IBLA 74-257 (June 24, 1974). Therefore, Herman Joseph's Native Allotment Application and Evidence of Occupancy is rejected.

Christian G. Anderson, 16 IBLA 56, 57-58 (1974), recites in part as follows:

> The land under application was "withdrawn from sale, location, selection and entry under the public land laws" on January 22, 1943, by Public Land Order 82. Although some of the 67 million acres covered by that withdrawal were released and restored to entry on December 8, 1960 (Public Land Order 2215), the subject land was covered into the Arctic National Wildlife Range by Public Land Order 2214 of December 8, 1960, and withdrawn for wildlife purposes. Thus, the land involved has been segregated from entry under the public land laws at all times since 1943. (Emphasis supplied.)

Thus it appears that the Fairbanks District Office construed Anderson beyond the facts of that case. No mention was made in Anderson of the date the application for withdrawal was filed, imparting a segregative effect to the lands involved. On the contrary, Anderson specifically adverts to the date of the withdrawal as being the crucial date. The use of the term "segregated" in Anderson, standing by itself, is perhaps ambiguous, but in the context of that decision, its meaning as "withdrawn" is crystal clear.

However, the apparent reliance placed upon 43 CFR 2351.3, relating to the segregative effect of a withdrawal application does not vitiate the impact of section 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1970). As previously indicated, section 24 provides that lands included in an application for powersite development "shall from the date of filing of the application be reserved from entry, location, or other disposal under the laws of the United States, until otherwise directed by the Federal Power Commission or by Congress."

Public Land Order (PLO) 3520, 30 F.R. 271 (1965), was issued "[b]y virtue of the authority contained in the Act of March 3, 1879 (20 Stat. 377, 394; 43 U.S.C. 31), as amended * * *."

The PLO classified the land in issue, among other lands, "as powersites so far as title to such lands and interests therein remain in the United States * * *." It further recited:

> This classification shall be subject to the provisions of section 24 of the Act of June 10, 1920 (41 Stat. 1075; 16 U.S.C. 818), as amended.

The regulation, 43 CFR 2091.2-5(a) recites in applicable portion as follows:

> The noting of the receipt of the [withdrawal] application under §§ 2351.1 to 2351.6 in the tract books or on the official plats maintained in the proper office shall temporarily segregate such lands from settlement, location, sale, selection, entry, lease and other forms of disposal under the public land laws, including the mining and the mineral leasing laws, to the extent that the withdrawal or reservation applied for, if effected, would prevent such forms of disposal.

Since PLO 3520 invokes section 24 of the Federal Power Act and since under that section the application for withdrawal, when filed and noted, is effective immediately to withdraw the lands, we are constrained to the view that appellant's use and occupancy of the land in issue, to comply with the Assistant Secretary's directive, must have been for a period of five years preceding the filing and notation of the application for withdrawal for power purposes.

Thus, taking appellant's factual contentions at face value, he cannot show five years of occupancy prior to 1963. Nothing in the brief impels the conclusion that the Secretary's exercise of discretion was not properly employed in interpreting the five-year rule. We have considered appellant's other contentions and find them without merit. See Warner Bergman, 21 IBLA 173 (1975).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Frederick Fishman
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Anne Poindexter Lewis
Administrative Judge